Response of the Government of the United States to May 1, 2000 Petition
Case No. 12.185 (Michael Domingues)

The Government of the United States submits this response to the petition filed in Case No. 12.185 (Michael Domingues). The Government of the United States respectfully requests that the Inter-American Commission on Human Rights ("Commission") declare the petition inadmissible under Commission Regulation 34 (a)-(b)[1]: The petition fails to state facts that constitute a violation of rights set forth in the American Declaration of the Rights and Duties of Man ("American Declaration") and is manifestly groundless.

The petition in this case claims that the execution by the State of Nevada of a death sentence imposed on Mr. Domingues would violate the international obligations of the United States. Petitioner alleges that the imposition of capital punishment on an individual who committed a capital offense at the age of sixteen or seventeen years old violates the American Declaration, the treaty obligations of the United States, customary international law, and a *jus cogens* norm of international law.

While the United States accepts and respects the inherent right to life of all individuals, it is not bound by any principle of international law which prohibits the execution of juvenile offenders. The right to life – as recognized and protected by various international legal instruments – does not proscribe capital punishment of offenders who commit capital offenses when they are sixteen or seventeen years old, so long as the sentence is imposed and carried out in accordance with due process. The United States recognizes that some treaties would bar the imposition of the death penalty on juvenile offenders such as Mr. Domingues, however, the United States has accepted

[1] Inter-American Commission on Human Rights: Rules of Procedure Article 34, Other Grounds for Inadmissibility
"The Commission shall declare any petition or case inadmissible when:
a. it does not state facts that tend to establish a violation of the rights referred to in Article 27 of these Rules of Procedure;
b. the statements of the petitioner or of the State indicate that it is manifestly groundless or out of order; or,
c. supervening information or evidence presented to the Commission reveals that a matter is inadmissible or out of order." 40 I.L.M. 752, Reports and Other Documents (May 1, 2001).

no obligation under these instruments that would prohibit the State of Nevada from carrying out this sentence. Furthermore, there is no customary international law or *jus cogens* principle that prohibits the execution of offenders by the United States at the federal or state level. On this basis, therefore, the Commission should dismiss the petition filed in this case under Regulation 34 (a)-(b).

FACTS AND PROCEDURAL HISTORY

On October 22, 1993, sixteen-year-old Michael Domingues brutally murdered Arjin Chanel Pechpo and her four-year-old son, Jonathan Smith. After the victims arrived home, where Domingues was waiting for them, Domingues threatened Pechpo with a gun and tied her up with a cord which he used to strangle her. He then ordered the boy to take off his pants and get into the bathtub with his mother's dead body. When an attempt at electrocuting the four-year-old failed, Domingues stabbed Jonathan with a knife multiple times, killing him. Two weeks before the murders, Domingues told his girlfriend of his plan to beat up and kill a person in the neighborhood. After the murders, Domingues bragged about killing Pechpo for her car, gave items he had stolen from Pechpo as gifts to friends, and used the victim's credit card. Domingues v. Nevada, 112 Nev. 683, 917 P.2d 1364,112 Nev. 683; 917 P.2d 1364 (1996).

Following a jury trial in the Eighth Judicial District Court of Nevada, Clark County, Domingues was convicted of first-degree murder, first-degree murder with a deadly weapon, burglary, and robbery with use of a deadly weapon. Domingues was sentenced to death for each of the two murder convictions, and the Supreme Court of the State of Nevada affirmed the conviction. 917 P.2d 1364 (Nev. 1996). The United States Supreme Court denied Domingues' petition for a writ of *certiorari*. 519 U.S. 968 (1996). Subsequently, Domingues filed a motion in state court for the correction of an illegal sentence; he claimed that, because he was sixteen years old at the time of the murders, his execution would violate the International Covenant for Political and Civil Rights as well as customary international law. The state trial court denied the motion, and the Supreme Court of Nevada affirmed the lower court decision, based on the fact that the United States had ratified the Covenant with a reservation that exempted the United States from the Covenant's bar on the execution of juvenile offenders.

Domingues v. State, 961 P.2d 1279 (Nev. 1998). Thereafter, the United States Supreme Court denied Domingues' petition for a writ of *certiotari*. Domingues v. Nevada, 120 S.Ct. 396 (U.S. 1999).

ARGUMENT

I. Imposition Of Capital Punishment On Juvenile Offenders Does Not Violate Any Treaty Obligation Of The United States.

The United States recognizes that some treaties contain provisions that would prohibit the imposition of the death penalty in this case – including the American Convention on Human Rights ("American Convention"), the Convention on the Rights of the Child (CRC), and the International Covenant on Civil and Political Rights (ICCPR). However, the United States is not a party to either the American Convention or the CRC and, with respect to the ICCPR, the United States has accepted no obligation under any of that instrument to abjure or prohibit the imposition of the death penalty in this case.

A. The United States Has Accepted No Obligation Under Any Instrument Within the Competence of This Commission Regarding the Execution of Juvenile Offenders.

Petitioner incorrectly asserts that the American Declaration creates a binding obligation on the United States not to execute juvenile offenders. Petitioner's reliance on the Declaration is misplaced for two important reasons. First, as the United States has consistently asserted before this Commission, the American Declaration does not create binding legal obligations. Second, by its plain language, the American Declaration recognizes only the right to life; it does not prohibit either the death penalty or the execution of juvenile offenders.

Further, the United States, as noted, is not a party to the American Convention. Therefore, none of the Convention's provisions are applicable.

B. The United States Has Accepted No Obligation To Prohibit Capital Punishment For Juvenile Offenders Under The International Covenant On Civil And Political Rights.

Petitioner claims that Mr. Domingues' execution would constitute a violation of U.S. obligations under the ICCPR. While petitioner correctly notes that article 6(5) of the ICCPR prohibits the execution of juvenile offenders, the United States made a valid, effective reservation to this provision. Accordingly, it is under no obligation to prohibit the imposition of the death penalty in this case.

1. The United States' Reservation To Article 6(5) Is Valid And Effective As A Matter Of International Treaty Law.

Making reservations to international agreements is a well-established feature of treaty law and practice by which a state may decline to accept certain provisions of a treaty. *See* Vienna Convention on the Law of Treaties (Vienna Convention), May 23, 1969, art. 2(1)(d), 1155 U.N.T.S. 332, 8 I.L.M. 679; *see also* Restatement (Third) of the Law of Foreign Relations of the United States § 313 (1987)(Restatement). As recognized by the United Nations International Law Commission, this rule applies equally to human rights instruments like the ICCPR. Report of the International Law Commission on the Work of its Forty-Ninth Session, 12 May - 18 July 1997, U.N. GAOR, 52nd Sess., Supp. No. 10, at 94, PP 44-45, U.N. Doc. A/52/10 (1997). Indeed, the ILC Special Rapporteur has concluded no exception to the Vienna Convention is necessary for human rights or other normative treaties. *See id.*

Under treaty law and practice, if treaty partners disapprove of a reservation made by the United States to a treaty, those partners may object to the reservation. The provisions to which the reservation relates do not apply as between the reserving and objecting states, unless the objecting state indicates that it declines to recognize a treaty relationship with the reserving state. Out of the 149 states that are parties to the ICCPR, only 11 have objected to the United States' reservation to Article 6(5). *See* Multilateral Treaties Deposited with the Secretary General: Status as at 31 Dec. 2000, U.N. Doc. ST/LG/SER.E/19 (2001). Significantly, not one of these States noted that it does not recognize the ICCPR as being

in force between itself and the United States. Unambiguous State practice under the ICCPR, therefore, supports the validity of the United States' reservation to Article 6(5). *See* Vienna Convention, art. 20(4)(b) (objection by a contracting state to another state's reservation to part of a treaty does not prevent the treaty from entering into force between the two states unless such an intention "is definitely expressed by the objecting State").

Furthermore, while states are prohibited from making reservations incompatible with a treaty's object and purpose, to defeat the "object and purpose" of a treaty, a reservation must be incompatible with the agreement as a whole. There is no bright-line standard for application of the object and purpose test; rather, the International Court of Justice (ICJ) endorses a case-by-case analysis of multilateral treaties to determine what sort of reservations, if any, could be made, and what their effect would be, based on the treaty's "character[,] ... purpose, provisions, mode of preparation and adoption." Reservations to Convention on Prevention and Punishment of Crime of Genocide, 1951 I.C.J. 15 (May 28) [hereinafter Genocide Convention case]. Under the ICCPR it is extremely significant that not one State Party asserted that it was not in a treaty relationship with the United States. In accordance with practice under the Vienna Convention, the U.S. reservations were presumed accepted one year after ratification by the other 138 States Parties that had not objected within twelve months.[2] *See* Gerard Cohen-Jonathan, Les Reserves dans les Traites Relatifs aux Droits de L'Homme, 4 Revue Generale de Droit International Public 915, 920 (1996).

The U.S. reservation to Article 6(5) is not contrary to the overall object and purpose of the ICCPR, which generally fosters respect for civil and political rights including: the right to self-determination, the right to equal protection of law, the right to be free from slavery, the right not to be subjected to torture, the right to a fair trial, freedom of religion, and freedom of assembly. The United States has undertaken an obligation to guarantee those rights safeguarded by the ICCPR; however, it has exercised its sovereign right to limit its treaty obligations with regard to others. A reservation to

[2] Moreover, as noted above, with respect to those states objecting, only Article 6(5), not the ICCPR as a whole, can be deemed not to apply as between the United States and objecting States.

Article 6(5), which addresses only one provision of a treaty that addresses a wide range of civil and political rights, does not constitute a rejection of the treaty's overall object and purpose.

2. There Is No Correlation Between Non-derogability Of A Right Under Article 4 Of The ICCPR And The Centrality Of That Right To The Treaty.

Petitioner appears to allege that by making certain provisions, notably article 6(5)'s prohibition of the execution of juvenile offenders, non-derogable during times of emergency, the ICCPR, and therefore States Parties thereto, have expressed an intent that no reservation to article 6(5) is permissible. This claim has no basis in fact or law.

Although article 4(2) of the ICCPR makes Article 6(5) non-derogable in times of emergency, Article 6(5) is not so fundamental to the treaty that no reservation may be taken to it. The derogability of a provision is very different from the validity of reservations. Several rights of profound importance, such as the right against arbitrary arrest and detention (protected by Article 9(1)) and the right to be informed of the nature of criminal charges brought against one (protected by Article 14(3)(a)), are not made non-derogable under the ICCPR.

If the parties to the Covenant had intended to prohibit reservations to Article 6(5), they could have so provided explicitly, as authorized by Article 19(b) of the Vienna Convention. Making the article non-derogable during times of emergency does not, however, mean that reservations are not permitted. Accordingly, as a matter of treaty law, the United States' reservation to Article 6(5) is valid and effective.

II. Imposition of the Death Penalty on Juvenile Offenders Does Not Violate Customary International Law.

A. There Exists No General And Consistent State Practice Based On Opinio Juris Sufficient To Establish A Customary International Legal Prohibition Of The Execution of Juvenile Offenders.

There is no customary international legal principle prohibiting the execution of sixteen and seventeen year old offenders. Customary international law is international law resulting from a general and consistent practice of states followed by them from a sense of legal obligation, or *opinio juris. See* Carter Trimble, International Law (3rd), 1999, 134-136 (*citing* J. Starke, Introduction to Law (9th ed.) 1984, 34-38; Restatement § 102(2).

In this instance, there is no uniform state practice regarding the execution of juvenile offenders. There are at least fourteen additional States that do not have domestic laws that prohibit the imposition of the death penalty on persons who committed a capital offense when under the age of eighteen,[3] including: Afghanistan, Burundi, Bangladesh, the Democratic Republic of the Congo, India, Iran, Iraq, Malaysia, Morocco, Myanmar, Nigeria (excepting federal law), Pakistan, the Republic of Korea, Saudi Arabia and the United Arab Emirates.

Further, there is no evidence of the requisite *opinio juris* to indicate the existence of a customary international legal principle prohibiting the execution of sixteen and seventeen-year-old offenders. For *opinio juris* to exist, there must be a "sense of legal obligation, as opposed to motives of courtesy, fairness, or *morality*… and the practice of states recognizes a distinction between obligation and usage." Brownlie, Principles of Public International Law (5th), 1998 (emphasis added).

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[3] *See* Sixth quinquennial report of the Secretary General on capital punishment, *reported in* UN Doc. E/2000/3 (Mar. 31, 2000), at p. 21 and FN 36 ("There are at least 14 countries which have ratified the Convention on the Rights of the Child without reservation but, as far as is known, have not yet amended their laws to exclude the imposition of the death penalty on persons who committed the capital offence when under 18 years of age."

Here, the petitioner presents absolutely no evidence that those States that have passed laws prohibiting the execution of juvenile offenders have done so out of a sense of legal obligation to do so, that is, a legal obligation arising from customary law rather than from a treaty. While it is true that many States have prohibited this practice after accepting a treaty obligation to do so, this is not the kind of obligation sufficient to create *opinio juris* for purposes of establishing customary international law.[4] Further, with regard to those States that have ended the practice where they have not accepted a treaty obligation to do so, the petitioner has presented no evidence they did so out of a sense of a customary international legal obligation rather than for national perceptions of moral or political goals.

B. The Existence of International Instruments Prohibiting The Execution of Juvenile Offenders Does Not Establish A Customary International Legal Principle To This Effect.

Although certain international instruments prohibit the execution of juvenile offenders, these instruments neither bind the United States on this point nor create a new norm of customary international law. For example, Article 6(5) of the American Convention recognizes that capital punishment shall not be imposed upon persons who were under the age of eighteen at the time the crime was committed. *See* American Convention on Human Rights, Nov. 22, 1969, art. 4(5), 1144 U.N.T.S. 123, 125, 9 I.L.M. 673, 676. Nonetheless, Article 6(5) was approved only by a two vote margin, with 40% of the assembled states abstaining from voting in favor of the provision. Accordingly, the mere existence of such a provision in this instrument cannot support a claim that this standard is recognized as a norm of customary international law, certainly not in the Americas. Digest of U.S. Practice in International Law, Vol. I, p. 882 (1981-1988) (*citing* United States Memorandum to Edmundo Vargas Carreno, Executive Secretary of the Inter-American Commission on Human Rights (July 15, 1986)).

[4] It cannot credibly be argued that legal obligation arising from a treaty is sufficient to constitute *opinio juris* for purposes of establishing customary international law. To accept such a principle would conflate the two sources of international law – treaty and custom – to the point that no distinction could be drawn between the two.

The Convention on the Rights of the Child also contains a prohibition against the death penalty for persons who were under 18 at the time of their offenses. *See* Convention on the Rights of the Child, Nov. 20, 1989, art 37(a), G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49 at 167, U.N. Doc. A/11/19, 28 I.L.M. 1118, 1470. The United States agreed, however, to the adoption by consensus of the provision against capital punishment for juvenile offenders only on the condition that it retained the right to ratify the Convention with a reservation on this point. *See* Commission on Human Rights, Report of the Working Group on a Draft Convention on the Rights of the Child, 45th Sess., 2 Mar. 1989, at 101, U.N. Doc. E/CN.4/1989/48.

As indicated above, the ICCPR also includes a prohibition on the execution of juvenile offenders in Article 6(5), which states: "[s]entence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women." Although there was no separate vote on the words "shall not be imposed for crimes committed by persons below eighteen years of age," Article 6(5) was adopted by fifty-three votes to five, with fourteen abstensions. Commission on Human Rights, 12th Session (1957), A/3764, § 120 (o), [A/C.3/SR.820, § 25]; *See* Bossuyt, M.J., *Guide to the "Travaux Preparatoires" of the International Covenant on Civil and Political Rights,* p. 143 (Martinus Nijhoff Publishers 1987). The fact that more than one third of the countries either abstained from the vote or opposed Article 6(5) does not provide corroboration for the claim that this rule is recognized as a norm of customary international law.

Moreover, recent attempts to negotiate instruments that state that international law "clearly establishes that the imposition of the death penalty on persons aged under eighteen at the time of the offense is in "contravention of customary international law" have failed. For example, at the last meeting of the U.N. Commission on Human Rights, a draft decision of the Sub-Commission for the Promotion and Protection of Human Rights reported in UN Doc. E/CN.4/2001/2, at 14, which put forth such a proposition, failed to be adopted by the Commission. Thus, a review of the circumstances under which various treaties addressing the question were adopted establish no clear consensus of either state practice or *opinio juris*. Accordingly,

customary international law does not prohibit the execution of juvenile offenders.

C. The United States Has Persistently Objected To The Development Of A Customary International Legal Principle Prohibiting The Execution Of Juvenile Offenders.

Even if the execution of sixteen and seventeen-year-old offenders were prohibited by customary international law – which it is not – the United States has consistently and persistently objected to the application of such a principle to the United States. It is generally accepted that, a state may contract out of a custom in the process of formation by persistent objection. *See* Restatement (Third) Foreign Relations Law of the United States 102 cmt. d ("In principle a dissenting state which indicates its dissent from a practice while the law is still in the process of development is not bound by that rule of law even after it matures."). On this basis, therefore, the United States would not be bound by such principle if it existed.

As a matter of domestic law, the laws of many states within the United States provide for the prosecution of juveniles as adults for the most serious crimes, either automatically or after a transfer review process. Half of the states in the United States permit juveniles to be prosecuted as adults in certain capital cases: five states have chosen age seventeen as the minimum age and, in eighteen states, sixteen is the minimum age. Persons under sixteen years of age at the time of the crime may not be subject to capital punishment in the United States, as the U.S. Supreme Court held that such executions would violate the U.S. Constitution. *See Thompson v. Oklahoma*, 487 U.S. 815 (1988) (executions of offenders age fifteen at the time of the their crimes are unconstitutional).

In addition to the positions taken during the negotiation of the instruments described above, *see supra* at Section II. - B., the United States has persistently asserted its right to execute juvenile offenders in multiple international fora, such as the United Nations General Assembly, the United Nations Commission on Human Rights, responses to U.N. Special Rapporteurs, the Council of Europe, the Organization for Security and Cooperation in Europe, the Organization of American States, and the Inter-

American Commission on Human Rights. *See, e.g., In Re Roach,* Case 9647, ¶ 38 (g)-(h) (Inter.-Am.C.H.R. 1987); UNCHR Res. 2001/68 (Apr. 25, 2001) calling for a moratorium on executions (27-18(United States)-7); *see also* UNCHR Res. 2001/45 (Apr. 23, 2001) on extra-judicial, summary or arbitrary executions and UNCHR Res. 2001/75 (Apr. 25, 2001) on the rights of the child which called upon all states "in which the death penalty has not been abolished, to comply with their obligations as assumed under relevant provisions of international human rights instrument"; *see also* Brief of the United States in Domingues v. Nevada, 120 S.Ct. 396 (U.S. 1999).[5]

In sum, the United States cannot be bound by any customary international legal principle purporting to prohibit the execution of juvenile offenders given its persistent objection to the application of any such standard to the United States.

III. There Exists No *Jus Cogens* Prohibition On The Execution of Juvenile Offenders.

A *jus cogens* norm holds the highest hierarchical position among all other international norms and principles. As a consequence, *jus cogens* norms are deemed to be non-derogable. Shaw, Malcolm N., International Law (4th) 1997, at 544. For a norm to be *jus cogens,* the international community of States as a whole must accept and recognize not only the norm but also its preemptory character. Vienna Convention on the Law of Treaties, art. 53; s*ee also* Restatement of Foreign Relations Law of the United States (Third) § 102(3).

The precise nature and scope of the concept of *jus cogens* however is a much disputed topic, and far more

[5] The only limited exception to the United States' policy regarding capital punishment of juveniles is its ratification of the Fourth Geneva Convention, which prohibits imposition of the death penalty against a national of another country held during time of war who was under 18 when he committed the offense. *See* Geneva Convention Relative to the Protection of Civilian Persons in time of War, Aug. 12, 1949, art. 68, 6 U.S.T 3516, 3560, 75 U.N.T.S. 286, 330. This does not vitiate the United States' status as a persistent objector, however. The Fourth Geneva Convention addresses only the specific case of foreign nationals held during time of war, and does not address the imposition of capital punishment by a country on its own citizens or aliens in its country in time of peace.

opinion exists that defines the concept of *jus cogens* than determines its particular content. Brownlie, Principles of Public International Law (5th), 1998. Piracy and genocide are the most commonly cited *jus cogens* prohibitions, but there is no consensus on other norms. What is clear is that not all human rights and fundamental freedoms establish *jus cogens* norms.

There is no *jus cogens* norm that establishes eighteen years as the minimum age at which an offender can receive a sentence of death. In order to so hold, the Commission would have to decide that this alleged prohibition has similar force to prohibitions such as those against piracy and genocide. There is simply no support for this proposition.

In Re Roach addressed the United States' use of the death penalty in the separate cases of James Terry Roach and Jay Pinkerton. When Roach was seventeen years old, he committed the rape and the murder of a fourteen-year-old girl and the murder of the girl's boyfriend; similarly, Pinkerton committed murder in the course of a burglary with the intent to commit rape, when he was seventeen years old. In In Re Roach, the Commission found that in the member States of the Organization of American States there was a recognized norm of *jus cogens* that prohibits the State execution of children. *See* In Re Roach, Case 9647, ¶ 56 (Inter.-Am.C.H.R. 1987). Notably, the Commission did not find that there was a *jus cogens* norm that prohibits the imposition of the death penalty for 16 – 18 year old offenders. Indeed, the Commission refused even to find that such a prohibition existed in customary international law.[6]

[6] The Commission also remarked that the diversity of state practice in the United States, regarding the imposition of the death penalty and the minimum age limit, "resulted in a patchwork scheme of legislation" and "[made] the severity of the punishment dependent…on the location where [the crime] was committed." In Re Roach, Case 9647, ¶ 61-62 (Inter.-Am.C.H.R. 1987). The implication that there was inequality before the law unless all fifty states maintained uniform laws was contradictory to the foundation of a federal system. The keystone of a constitutionally formulated federalism was the division of political and legal powers between two systems of government. Knapp v. Schweitzer, 357 U.S. 371 (1958). Under a federal system, states were expected to have different laws, because "[e]ach has the power, inherent in any sovereign, independently to determine what shall be an offense against its authority and to punish such offenses." United States v. Wheeler, 435 US 313, 320 (1978)(quoting United States v. Lanza, 260 U.S. 377, 382 (1922).

The petition before the Commission in this case presents no evidence to support a finding to the contrary today. If the Commission was unable to find sufficient state practice to recognize a customary international legal prohibition on executing offenders less than 18 years old in 1987, to now recognize this very same principle as *jus cogens* today would fly in the face of reason.

CONCLUSION

The appellate process in the United States affords those convicted of capital offenses the very highest level of due process. The United States does not treat the imposition of the death penalty lightly or subject capital cases to mere cursory review. On the contrary, the U.S. appellate process provides avenues for both state and federal court review of every criminal conviction. To safeguard the due process rights of defendants, some appeals are automatic and provide for mandatory direct appeal of capital sentences. In general, appellate review in the United States ensures that defendants' trials are fair and impartial, that convictions are based on substantial evidence, and that sentences are proportionate to the crime.

The U.S. practice regarding execution of juvenile offenders is consistent with its obligations under international law. The United States had accepted no treaty obligation which would have prohibited it from executing Mr. Domingues in this case. The total abolition of capital punishment has not yet risen to the level of customary international law, and customary international law does not prohibit the execution of a person aged sixteen or seventeen at the time of commission of the crime for which they were judged competent to be tried as adults. Even if such a legal norm existed – which it does not – the United States would not be bound by it as our long-standing practice in this area represents a consistent pattern of dissent. Finally, there exists no *jus cogens* prohibition on the execution of offenders, who were juvenile at the time of their offense.

On the basis of the foregoing, therefore, the United States respectfully requests that the Commission dismiss the petition in this matter.